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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1158

L. ARTHUR BURTON, LOUIS A. BENTON, EDMOND H. SHULER, AL L. TOTH, HERMAN TREPTOW, GEORGE SCHIELKE and CITIZENS COMMITTEE FOR FIREARMS LEGISLATION, a corporation of the State of New Jersey,

Appellants,

v.

ARTHUR J. SILLS, Attorney General of the State of New Jersey, and COLONEL DAVID B. KELLY, Superintendent of State Police of New Jersey,

Appellees.

On Appeal from the New Jersey Supreme Court

MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF

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Appellees.

On Appeal from the New Jersey Supreme Court

Motion to Dismiss

Pursuant to Rule 16(1)(b) of this Court, the Attorney General of the State of New Jersey, on behalf of himself and Colonel David B. Kelly, Superintendent of the State Police of New Jersey, hereby moves to dismiss this appeal on the grounds that it does not present a substantial federal question.

Statement of Questions Presented

1. Does the Second Amendment to the United States Constitution prevent a state from regulating the sale of firearms?

2. Should this Court entertain arguments addressed to the validity under the United States Constitution of individual sections of the New Jersey Firearms Law, when the Supreme Court of New Jersey declined to consider such arguments because the appellants had not been personally affected by the sections which they question?

Statement of the Case

This is an appeal from a judgment of the Supreme Court of New Jersey, upholding the constitutionality of the New Jersey Firearms Law as amended by Chapter 60 of the Public Laws of New Jersey of 1966 (P85).

The litigation was commenced by a complaint in lieu of prerogative writ, seeking a declaration that Chapter 60 is unconstitutional and an injunction against its enforcement. The plaintiffs include three sportsmen, two gun dealers, and a corporation allegedly organized to promote the sport of shooting. The defendants are the public officials responsible for the enforcement of Chapter 60, the Attorney General of the State of New Jersey and the Superintendent of the State Police.

The main thrust of Chapter 60 is to prevent unfit and criminal elements from acquiring firearms. The legislation seeks to accomplish this objective by providing that a person who desires to purchase firearms must first apply for a firearms purchaser identification card or pistol permit, and that certain classes of persons are not to be granted such cards or permits. N.J.S. 2A:151-33. The Act thus provides that an identification card or permit shall not be

issued where the prospective purchaser (1) has been previously convicted of a crime; (2) is addicted to narcotics; (3) is a habitual drunkard; (4) is confined to a hospital for reasons of mental disorder; (5) is a minor under the age of 18 years; or (6) is a person to whom issuance would not be in the interest of the public health, safety, or welfare. N.J.S. 2A:151-33(a), (c) and (d). Persons who have been alcoholics, confined for mental disorders or suffered from physical defects which would make it unsafe for them to handle firearms must produce satisfactory evidence of their present competency to handle firearms. N.J.S. 2A:151-33 (b).

One of the means which the law provides to enable the issuing officers to determine whether an applicant for a firearms identification card or pistol permit falls within one of the disqualified classes is the requirement that an application, containing various pertinent information, be submitted. In the application both for permits and for identification cards, the applicant must set forth his name, address, place of business, sex, occupation, age and distinguishing physical characteristics. He must also state whether he is disqualified from obtaining a permit or identification card by reason of any of the grounds stated in N.J.S. 2A:151-33 and N.J.S. 2A:151-35. The applicant's fingerprints shall be taken if he has not previously provided them in a prior application for a permit or identification card.

The permit or identification card is to be granted within 10 days unless good cause for a denial appears. N.J.S. 2A:151-36. Any applicant aggrieved by a denial may, within 30 days of the denial, request a hearing in the appropriate county court and such hearing shall be held within 30 days. N.J.S. 2A:151-34. No formal pleadings nor filing fees are required.

The complaint alleged that Chapter 60 does not set forth any standards to guide officials in determining whether a particular applicant is disqualified from obtaining a firearms purchaser identification card (P4a-3 to 18); restricts and hampers the hunters safety program of the State of New Jersey (P5a-1 to 5); impinges upon the rights and privacy of applicants for firearms purchaser identification cards (P5a-6 to 11); interferes with the free flow of interstate commerce and the right of gun dealers to do business within and without the State (P5a-12 to 18); is not reasonably related to the public safety, morals, health and welfare of the State (P5a-21 to 24); and also violates Article I, section 8, and the First, Second, Fifth, Ninth and Fourteenth Amendments of the United States Constitution as well as Article 1, sections 1 and 21 of the New Jersey Constitution. Many of these allegations, initially raised in "shotgun" form by the appellants' complaint, were not pursued and thus not expressly considered by the state courts.

On a motion for summary judgment, the Superior Court, Law Division, sustained the constitutionality of Chapter 60 and dismissed the appellants' complaint. 99 N. J. Super. 516, 240 A. 2d 462 (1967) (Reprinted in Appendix "C" to Jurisdictional Statement, at P71 to P80a). On appeal, its judgment was affirmed by the Superior Court, Appellate Division. 99 N. J. Super. 459, 240 A. 2d 432 (1968). (Reprinted in Appendix "D" to Jurisdictional Statement, at P81 to P84).

On December 16, 1968, the Supreme Court affirmed the decisions of the courts below and sustained the constitutionality of Chapter 60. 53 N. J. 86, 248 A. 2d 521 (1968) (Reprinted in Appendix "B" to Jurisdictional Statement, at P52 to P70). In its opinion, the court found sufficient factual support for the legislative judgment that such regulation of the sale and use of firearms was necessary in fur-

therance of the public interest. The court also held that the Second Amendment to the United States Constitution, having been adopted to protect the state militias against possible federal encroachment, does not confer an individual right to bear arms, and that in any event, a regulatory provision such as Chapter 60 would not violate the Amendment.

The New Jersey Supreme Court also referred to several other constitutional points raised by the appellants, including claims that individual sections of the law violated the First and Fifth Amendments (App. "B" at P55 to P56 and P67 to P68). The court refused to rule on these points, however, because none of the appellants could show that he had been personally affected by these sections of Chapter 60.

ARGUMENT

POINT I

The appellants have not presented a substantial constitutional issue entitling them to appeal, because the decisions of this Court clearly establish that laws regulating the sale and use of firearms, such as Chapter 60 of the Public Laws of New Jersey of 1966, do not violate the Second Amendment of the United States Constitution.

The Second Amendment of the United States Constitution provides:

> "A well regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed."

As the appellants frankly acknowledge, the major decisions of this Court have consistently construed the Second Amendment to limit only the power of the federal government.

In *United States* v. *Cruikshank*, 92 U. S. 542 (1875), the Court pointedly described the limited scope of the Second Amendment:

> '. . . [It] declares that [the right of the people to keep and bear arms] shall not be infringed; but this . . . means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes, to . . . internal police . . .'' 92 U. S. at 553.

The Court reaffirmed this interpretation of the Second Amendment in *Presser* v. *Illinois*, 116 U. S. 252 (1886), in holding valid an Illinois statute regulating military parades, and in *Miller* v. *Texas*, 153 U. S. 535, 538 (1894), which sustained a Texas statute prohibiting the carrying of dangerous weapons on the person.

It is also clear that the Second Amendment, in limiting the power of the Federal Government, merely guaranteed the right to keep and bear arms to the various state militias and not to individual citizens. In *United States* v. *Miller*, 307 U. S. 174 (1939), which involved a challenge of the National Firearms Act on Second Amendment grounds, the Court found that the Amendment did not guarantee the right to keep and bear any weapon not having a reasonable relationship to the preservation or efficiency of a well-regulated militia. Further, it said that the obvious purpose of the Amendment was to assure the continuation and ren-

der possible the effectiveness of the militia, subject to call and organization by Congress under Article 1, Section 8, clauses 15 and 16 of the United States Constitution, and that the Amendment must be interpreted and applied with that end in view.

Subsequent discussion of the Second Amendment is contained in two Circuit Court of Appeals decisions which the court declined to disturb. *United States* v. *Tot, reversed on other grounds,* 319 U. S. 463 (1943); *Cases* v. *United States,* 131 F. 2d 916 (1st Cir. 1942), *cert. denied* 319 U. S. 770 (1943). In *Tot* the court found it abundantly clear from a historical review of the conditions under which the Second Amendment was adopted that, unlike the First Amendment, it "was not adopted with individual rights in mind, but as protection for the states in the maintenance of their militia organizations against possible encroachments by the federal power." 131 F. 2d at 266. In the *Cases* opinion, the First Circuit similarly observed that the right to keep and bear arms "is not a right conferred upon the people by the federal constitution" and "whatever rights in this respect the people may have depend upon local legislation." 131 F. 2d at 921.

To avoid the onus of the cases holding that the Second Amendment is effective only against the Federal Government, and that it merely guarantees the right to keep and bear arms to the various state militas and not to individual citizens, the appellants urge that the "right to bear arms" is a "basic right" protected under the Ninth and Fourteenth Amendments (P14). This contention is frivolous. We note, to the extent it may be relevant, that there was no inalienable right to bear arms even at common law. Thus it was clearly provided by the Statute of Northhampton, 2 Edw. III, c. 3 (1328),

that no man should "go nor ride armed by night or by day in fairs, markets, nor in the presence of the justices or ministers . . ." See *Knights' Case,* 3 Mod. Rep. 117, 87 Eng. Repr. 75 (1686). In fact, the irresponsible brandishing of weapons was, even absent statute, a common-law crime. See *R.* v. *Meade,* 19 T. L. R. 540 (1903). Moreover, a careful study of the English Bill of Rights, enacted in 1688, discloses that it did not grant a sweeping personal right to bear arms, but merely re-established a long-accepted bulwark against tyranny by the central government—namely the citizen militia. See Bakal, *The Right to Bear Arms* (1966), pp. 300-301.

The relationship between this limited "right to bear arms" and the Second Amendment must be appraised in light of the circumstances surrounding enactment of the Amendment. The Articles of Confederation, by which the states first bound themselves together after the Revolutionary War, proved unsuccessful because the problems facing the new states could not be solved by the efforts of individual sovereignties, but rather necessitated the intervention of a stronger central authority. This led to the convening of the Constitutional Convention and the ratification of our present Constitution, followed shortly thereafter by the adoption of the first ten Amendments. However, while the need for a stronger federal union was evident, some states, particularly the smaller ones, were fearful that the central government would encroach upon their sovereign rights as independent states. One significant cause of concern was that a traditional source of state independence, the militia, would someday be weakened or eliminated, thus leaving the states prey to the standing army of a powerful and oppressive central government. See 1 *Annals of Congress* 749-750 (1789). To satisfy the states' desire that their militia system be forever preserved from any dangerous de-

gree of federal control, the Second Amendment was enacted. See Story, 3 *Commentaries on the Constitution of the United States;* §1890 at 746 (1833).

Therefore, the background to the enactment of the Second Amendment can be of no assistance to the appellants in urging that there is, or ever was, any fundamental personal right to bear arms. Instead, this historical material supports the conclusion that the "right to bear arms" is a political right, residing in the militia, and not a personal right, and that the purpose of the Second Amendment was solely to preserve this political right of the states as against the federal government.

POINT II

The constitutionality of the individual sections of Chapter 60 of the Public Laws of New Jersey of 1966 is not properly before the Court, because the Supreme Court of New Jersey declined to pass on the validity of these provisions absent any indication that the appellants had been personally affected by them.

Besides launching a broadside constitutional attack on Chapter 60 as being in violation of the Second, Ninth and Fourteenth Amendments, the appellants also point to certain alleged constitutional "defects" of particular sections of the law (P15 to P19). However, the Supreme Court of New Jersey did not pass on these issues because there was no indication that any of the appellants had been personally affected by the provisions challenged and thus the points raised were not ripe for consideration.

The Supreme Court of New Jersey's unwillingness to render an advisory opinion on abstract questions of constitutional law is fully in accord with generally accepted principles of constitutional adjudication.

In *N.A.A.C.P.* v. *Alabama,* 357 U. S. 449, 459 (1958), the Court said:

> "To limit the breadth of issues which must be dealt with in particular litigation, this Court has generally insisted that parties rely only on constitutional rights which are personal to themselves. Tileston v. Ullman, 381 U. S. 44, Robertson and Kirkham, Jurisdiction of the Supreme Court (1951 ed.), §298. This rule is related to the broader doctrine that constitutional adjudication should where possible be avoided. See Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 346-348 (concurring opinion)."

The appellants herein are classic examples of parties lacking standing to raise constitutional issues. None of them has stated that he is active in any organization which advocates or approves overthrow of the government. Nor does anyone state that he has had or would have any difficulty in answering any of the questions on the application forms. Moreover, none of them have refused to answer any of these questions or been denied a permit on grounds which relate to these inquiries.

Because the appellants are not personally affected by the specific sections of Chapter 60 whose validity they attack, there are no concrete factual applications of these sections currently before the Court. Consequently, it is not yet possible to know whether anyone will be adversely affected by the sections. Moreover, it is impossible to determine the exact manner in which they will be interpreted and applied by those responsible for administering the law. This situation prevents the issues which the appellants seek to raise from being "ripe" for adjudication. "Ripeness," equally as much as "standing,"

is a doctrine of constitutional adjudication employed by this Court to avoid ruling upon issues of purely academic interest. The rationale for the doctrine was well expressed in *Watson* v. *Buck*, 313 U. S. 387, 402 (1941) where the Court said:

> "A law which is constitutional as applied in one manner may still contravene the Constitution as applied in another. Since all contingencies of attempted enforcement cannot be envisioned in advance of those applications, courts have in the main found it wiser to delay passing upon the constitutionality of all the separate phases of a comprehensive statute until faced with cases involving particular provisions as specifically applied to persons who claim to be injured. Passing upon the possible significance of the manifold provisions of a broad statute in advance of efforts to apply the separate provisions is analogous to rendering an advisory opinion upon a statute or a declaratory judgment upon a hypothetical case."

The Supreme Court of New Jersey, in refusing to consider arguments addressed to the validity of individual sections of Chapter 60, thus acted in accordance with the decisions of this Court. Furthermore, appellants' contentions relating to the individual sections of the law come before this Court without the benefit of either interpretation of the pertinent stautory sections or a ruling as to their constitutionality by the state courts. For these reasons, the constitutional validity of the individual sections of Chapter 60 is not properly before the Court.

CONCLUSION

The appellants have not properly raised any substantial or important federal constitutional question which warrants the further attention of this Court and, therefore, it is respectfully urged that this appeal be dismissed.

Respectfully submitted,

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